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Nos. 79-1738, 80-945

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RICHARD NIXON,

Petitioner,

v.

A. ERNEST FITZGERALD,

Respondent.

BRYCE N. HARLOW AND
ALEXANDER P. BUTTERFIELD,

Petitioners,

v.

A. ERNEST FITZGERALD,

Respondent.

**On Writs Of Certiorari To
The United States Court Of Appeals For
The District Of Columbia Circuit**

REPLY BRIEF FOR PETITIONER RICHARD NIXON

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STATEMENT

The issue of absolute immunity is, of course, broader than the facts of any particular case. It is totally unnecessary for this Court to reach or resolve factual issues contested by the parties in the courts below. Accordingly, only a brief response to Fitzgerald's "Statement" is necessary.

The Statement in Fitzgerald's brief begins with four "basic facts" which, he contends, are "not significantly controverted" (Resp. Br. 2). This presentation is particularly misleading, since it omits the following "basic facts," not controverted at all in Fitzgerald's brief:

1. Secretary Seamans testified under oath and unequivocally that he *alone* issued the order abolishing Fitzgerald's job and was not advised to take this action by Mr. Nixon or anyone acting on his behalf. JA 159a-60a.

2. In December 1969, President Nixon personally asked his chief of staff and the director of the Bureau of the Budget to place Mr. Fitzgerald in that White House organization. *See* Nixon Br., p. 10. (Respondent has never found a satisfactory way of explaining this clear contradiction of his central allegation of a willful conspiracy against him, and thus chooses only to ignore it).

3. On February 1, 1973, the day after Mr. Nixon stated in public that he had ordered Fitzgerald's termination (which had occurred in 1969), the White House issued a retraction, stating in part that "the President did not . . . have put before him the decision regarding Mr. Fitzgerald." JA 196a.

4. Tape-recorded conversations between Mr. Nixon and his aides clearly reflect that Mr. Nixon was "thinking of another guy" (JA 220a) during his press conference, and not Fitzgerald.

Fitzgerald's presentation of the subsidiary facts also confirms dramatically Judge Gesell's prescient observation concerning the means through which skillful plaintiff's counsel may marshall snippets of evidence to overcome summary judgment in cases such as this (*Halperin* v. *Kissinger*, 606 F.2d 1192, 1214 (D.C. Cir. 1979) (Gesell, J., concurring)):

> It is not difficult for ingenious plaintiff's counsel to create a material issue of fact on some element of the immunity defense.
>
> * * *
>
> A sentence from a casual document or a difference in recollection with regard to a particular policy conversation held long ago would usually, under the normal summary judgment standards, be sufficient.

By way of example only, there are at least four misleading aspects to Fitzgerald's contention that White House tape recordings show that (Resp. Br., p. 6):

> As Mr. Nixon later recalled it, Harlow "was all for canning" Fitzgerald. JA 284a. The Fitzgerald matter was recalled to be "all Harlow's ball game."

This contention (1) obscures the fact that the conversation was one in which Mr. Nixon was directing his press secretary to help Fitzgerald, (2) presents as a stated recollection what was in fact a question by Mr. Nixon as to whether "Bryce was all for canning him," (3) implies that Mr. Nixon, rather than Ziegler, recalled that the Fitzgerald matter was "all Harlow's ball game," and (4) omits any mention of the discussion, three seconds later in the conversation, of efforts to place Fitzgerald in OMB and the fact that Mr. Nixon had erred in his press conference. *See* JA 284a-85a. [1]

Fitzgerald's brief also misportrays Mr. Nixon's recorded conversations with his aides immediately following his 1973 press conference, three years after the relevant events had occurred. Fitzgerald makes little mention of the conversations during which Mr. Nixon discovered he had been mistaken during the press conference (JA 218a, 220a):

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[1] Fitzgerald also asserts that James Schlesinger "recalled that Mr. Nixon referred with disapproval to the 'Fitzgerald kind of thing' " at a meeting on the Manned Orbiting Laboratory (Resp. Br. 5 at n.8). Schlesinger actually "recalled" only a "passing reference" that he "think[s] . . . would have [been] referred to . . . as a Fitzgerald kind of thing" (Schlesinger Dep. (R. 432) 13), and which he could not place in time (*id.* at 32-33, 55). Other participants in the MOL meeting disagreed with Schlesinger's vague account (JA 164a; Mayo Dep. (R. 460) 10-12, 19; Laird Dep. (R. 455) 96-97). Fitzgerald's treatment of documents is no better. His assertion that Patrick Buchanan "endorsed Mollenhoff's view that the Air Force was 'firing . . . a good public servant' " (Resp. Br., p. 6) picks up four words from separate paragraphs of a memo in which Buchanan reported a *public perception* and ignores Mollenhoff's handwritten note on a copy of this memo that the characterization of Fitzgerald as "[a] good public servant might be questioned." JA 269a; DX 41; *see* Mollenhoff Dep. (R. 331-32) 132-33.

E: When Harlow was here. This case arose way early in the administration.

P: I thought it was a later —

E: No, no, no, no this is that guy that, uh, ratted on the C5A overruns.

P: Oh, yeah.

E: Way back.

P: But he's still in the Government.

E: And, no he's not and uh he's appealed to the Civil Service Commission to be restored.

P: I'm thinkin' of another case.

* * *

President: Uh — let me say that I, I've read this case, John. I'm thinking of another guy, actually, I — I —

Ehrlichman: You're thinking of that Navy fellow that talked about Ash. Yeah, the liti—

P: [unintelligible]

E: — this was four years back.

P: You see I had two names —

E: Yeah.

P: — in my mind.

Fitzgerald also errs in suggesting that Mr. Nixon directed his aides to prepare "the most godawful gobbledygook statement" in order to "permit Seamans to continue to invoke executive privilege and thus conceal White House involvement." Resp. Br., p. 10. The context of the conversation establishes that any such "statement" was to have been for purposes of Senate committee hearings on Watergate and in connection with Ehrlichman's discussions with "Ervin and all these people" with whom he had "been making the rounds." JA 217a. *See also* JA 184a (the press conference question to which a written answer was promised). John Ehrlichman so understood it and also viewed the use of "gobbledygook" as "a rather typical Nixonian piece of rhetoric, which meant to me that he did not want a short, concise, crystal clear document, but he wanted a document which was sufficiently

broad as to give him latitude." Ehrlichman Dep. (R. 444) 16, 18-19. Any doubt in this regard is laid to rest by the fact that Fitzgerald does not identify any "gobbledygook" statement issued by the White House permitting Seamans to continue to refuse to answer questions, and none exists.

At bottom, of course, this case does not depend on the resolution of such factual disputes, but on broader considerations. Nonetheless, these examples of respondent's ability to link together pieces of sentences and to rely on faulty recollections of obscure events underscore why forms of immunity that hinge in any respect on factual resolutions provide no dependable mechanism for "weeding out" frivolous suits.

ARGUMENT

I

Denial Of Absolute Immunity To The President Would Represent A Departure From History

Conceding the virtual absence of suits against Presidents until the very recent past, Fitzgerald proffers several explanations other than the immunity "historically accorded" the President. *See* Resp. Br., p. 21. His principal suggestion, "the difficulty of obtaining jurisdiction or proper venue against" the President, is incorrect, and the others he offers actually support Mr. Nixon's position.

Potential plaintiffs in the nineteenth century were not required by any rule to sue an "incumbent President only in the nation's capital and . . . a former President only where he resided." Resp. Br., p. 20. To the contrary, between 1789 and 1887, the most liberal general venue provision in our nation's history was in force; a plaintiff could sue in the district of the defendant's residence "or in which he shall be found at the time of serving the writ. . . ." Judiciary Act of 1789, § 11, 1 Stat. 73, 79. *See Camp* v. *Gress*, 250 U.S. 308, 311-12 (1919); 1 *Moore's Federal Practice*, ¶ 0.141[1], at 1337 n.2 (1981 ed.). Even after 1887, when venue was restricted, plaintiffs had no

more difficulty obtaining venue over a President in his personal capacity than other officials against whom suits were filed. [2]

The fact that plaintiffs were discouraged by the rule set out in *Spalding* v. *Vilas*, 161 U.S. 483 (1896), and that constitutional causes of action were slow to develop (Resp. Br., p. 21) supports, rather than undermines, Mr. Nixon's position. The "discouraging effect" of *Spalding* stemmed precisely from the fact that it confirmed, in Fitzgerald's words, that "federal executive officials enjoyed absolute immunity from damage suits under state statutory or common law for actions within the scope of their authority" (Resp. Br., p. 35), and these were the only causes of action then thought to be available. Respondent's explanations, then, hardly support the proposition that the immunity "historically accorded" the President was qualified. [3]

With regard to contemporaneous statements by the Framers and others concerning the subject of presidential immunity from suit, Fitzgerald's brief portrays such statements in a way wholly divorced from their intended context (*see* Resp. Br., pp. 15-16). Actually, the statements regarding the Framers' efforts to limit "privileges" were made when Americans were only a short period removed from being governed by royalty or its representatives, and as their context indicates, cannot be understood as commentary on the narrow category of legal rights Fitzgerald would now associate with that term. For example, James Wilson's comment on the "privilege[s]," "securit[ies]," and "distinction[s]" of the President (Resp. Br., p. 16) was a

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[2] Mr. Fitzgerald's brief exhibits confusion between suits against officials in their official and personal capacities. The idiosyncratic jurisdictional and venue problems to which Fitzgerald refers arose only in connection with the former category of suits. *See Stafford* v. *Briggs*, 444 U.S. 527 (1980). The dismissal of *Livingston* v. *Jefferson*, 15 F.Cas. 660 (C.C.D. Va. 1811) (No. 8,411), resulted from that suit's being classified as one of a class of "local actions" (because it involved real property), not a problem of venue applicable to suits generally.

[3] The statements by Presidents Jackson and Taft and Attorney General Butler which are quoted in Fitzgerald's brief to the effect that Presidents were liable with their subordinates (*see* Resp. Br., pp. 18, 19, 20 n.31) must also be viewed in the context of this understanding that executive officials were absolutely immune from actions within the scope of their authority.

rebuttal of the charge that the new government would be "the government of a few over the many — elected by themselves, or possessing a share in the government by inheritance, or in consequence of territorial rights, or some quality independent of the choice of the people." 2 J. Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, 523 (1836) (hereinafter "*Elliot's Debates*"). Similarly, Charles Pinckney's reference to limitations on "privilege" came in the context of a debate over whether Congress had the "privilege" (*i.e.*, power) of punishing a newspaper editor who had allegedly libelled legislators. 10 Annals of Cong., 6th Cong., 68-69 (1800).

Fitzgerald also omits the context of statements taken from a discussion in the North Carolina ratifying convention regarding the remedies available against "officers" (*see* Resp. Br., pp. 17-18). This discussion, prompted by concern that the difficulty of impeaching lower federal officials would leave citizens of the states without means to combat their abuses, was focused primarily on minor federal officers, such as "tax-gatherers." 4 *Elliot's Debates*, 36-37. Governor Johnson confirmed that charges against higher officials would be handled differently (*id.* at 37; emphasis added):

> *[M]en who were in very high offices could not be come at by the ordinary course of justice;* but when called before this high tribunal [the Senate] and convicted, they would be stripped of their dignity, and reduced to the rank of their fellow-citizens, and then the courts of common law might proceed against them.[4]

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[4] Particularly in light of these remarks, it is not clear that Mr. Maclaine's statement the next day that Presidents would be "amenable" for "maladministration" referred to remedies other than impeachment and later prosecution or that his assurance that "citizens" who were distressed "would have redress in the ordinary courts of common law" even if "the President should give wrong instructions to his deputies" (Resp. Br., pp. 17-18) meant that the "redress" would be a suit for damages directly against the President. A short time later, a naval captain, acting in accordance with a directive from President Adams, detained a ship coming *from* a French port when Congress had authorized only seizures of ships sailing *to* French ports. The owner recovered damages from the captain, not the President, in this case of "wrong instructions to . . . deputies." *Little* v. *Barreme*, 6 U.S. (2 Cr.) 170 (1804).

Our opening brief quoted the views of early commentators such as John Adams, Oliver Ellsworth, and Justice Story, who emphasized the President's special immunity from suit. Nixon Br., pp. 25-26. Fitzgerald's attempt to limit the significance of these more authoritative explications of the Constitution to civil actions brought while the President remains in office is misplaced. *See* Resp. Br., pp. 18-19. For instance, when John Adams heard of the suit brought by Edward Livingston against Thomas Jefferson, which was filed after Jefferson had left office, he wrote Jefferson, "Great God! Is a President of the U.S. to be subject to a private action of every individual? This will soon introduce the axiom that a President can do no wrong, or another equally curious that a President can do no right."[5] Justice Story's summary of the law on Presidential accountability was likewise not subject to Fitzgerald's limitation. III J. Story, *Commentaries on the Constitution of the United States*, § 1563, at 419 (1833 ed.) (emphasis added):

> In the exercise of his political powers [the President] is to use his own discretion, and *is accountable only to his country and to his conscience*.

In closing, it is appropriate to place in perspective the dispute between the parties over what the absence of suits against the President during our two hundred year history establishes. Obviously, the legal and factual background against which this Court must resolve the issue of Presidential immunity is far different from that facing the Framers and early legal scholars. The presence of the federal government in the everyday lives and thoughts of Americans was then more limited, constitutionally-based causes of action did not exist in anything like their present form, and litigation occupied little, if any, role in disputes over government policy.[6] Subject to this cautionary note,

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[5] Letter from John Adams to Thomas Jefferson dated February 10, 1812, *quoted in* D. Malone, *Jefferson and His Time: The Sage of Monticello*, 62 (1981).

[6] Fitzgerald's effort to distinguish "political" actions for which the President can be impeached from "private" actions giving rise to civil remedies is elusive and without support. By quoting Wilson's comment that a President is "amenable [to suit] in his private character as a citizen, and in his public character by impeachment" (Resp. Br., pp. 15-16), Fitzgerald suggests that

the historical absence of suits against the President does indicate that the immunity available to executive officials was absolute, as exemplified by *Spalding* v. *Vilas*, *supra*. There is certainly *no* indication that the immunity "historically accorded" the President was qualified. Moreover, some commentators perceived special problems in suits against a President, as opposed to his subordinates. *See* Nixon Br., pp. 25-26. Finally, Presidents were simply not the subject of lawsuits until very recently, a phenomenon for which Fitzgerald offers no plausible explanation consistent with his position. Subjecting the President to liability in damages would thus be a significant departure from history, with no assurance that such a departure could avoid substantial costs to the effective functioning of the Presidency.

II

The Decisions Of This Court Do Not Limit Absolute Immunity To Judicial And Legislative Functions

Fitzgerald characterizes the "message" of the Court's cases as being that only legislative and judicial functions are entitled to absolute immunity. Resp. Br., pp. 23-24. This construction cuts the doctrine of absolute immunity off from its genuine policy roots and rests on the unsupportable assumption that the impact of civil damage liability on persons performing judicial and legislative functions is unique.

There is no factual support in Fitzgerald's brief for his assertion that the "decision-making processes" of judges and prosecutors "are particularly vulnerable to the hazards and distractions of collateral civil liability" (Resp. Br., p. 23). In truth, judges and prosecutors derive a measure of security from their performance within a well-developed procedural framework. By contrast, the choices facing a President are thrust upon him in a far less structured fashion and without the benefit of the adversary system. Unable to rely on the

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the Framers supported his view that Presidents can be sued personally. However, Wilson's statement actually makes it clear that a President, in his capacity as a citizen, always remains subject to suit for private wrongs, but for improper actions as President, whether denominated "political" or of a "public character," impeachment is the intended remedy.

regularity of the judicial process, Presidents actually have more to fear from "the hazards and distractions of collateral civil liability," and their "decision-making processes" are, in this sense at least, more vulnerable. For the same reason, litigation threatens the same "unduly inhibiting power over the deliberative processes" (Resp. Br., p. 23) of the President as the Congress.[7]

Nor can limiting absolute immunity to "judicial" and "prosecutorial" functions be justified on the basis of "procedural safeguards and the appellate process" which "ensure that deliberate constitutional violations will be minimized." *See* Resp. Br., p. 23. No such safeguards limit legislative action, and conduct by judges and prosecutors which would be actionable absent immunity invariably circumvents or vitiates the "procedural safeguards" of the judicial system. For example, in *Stump* v. *Sparkman*, 435 U.S. 349 (1978), a judge was held immune in a case in which he had approved the sterilization of a minor without notice to the child involved and without even the creation of a court file. The very essence of the judge's alleged misconduct was that he took action in a manner which rendered all of the "procedural safeguards" of the judicial system meaningless. The

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[7] Fitzgerald seeks to further his argument that Presidents have no absolute immunity by pointing to the specific inclusion of the Speech or Debate Clause in Article I as a protection from civil suits for members of Congress. The inference he would have this Court draw runs contrary to prior rulings of this Court in which it held

> The difference between the grant of legislation power under Article I to Congress, which is limited to powers therein enumerated, and the more general grant of the executive power to the President under Article II, is significant. The fact that the executive power is given in general terms strengthened by specific terms where emphasis is appropriate, and limited by direct expressions where limitation is needed and that no express limit is placed on the power of removal by the executive, is a convincing indication that none was intended.

Myers v. *United States*, 272 U.S. 52, 128 (1926). In line with this construction, this Court, in *United States* v. *Nixon*, 418 U.S. 683 (1974), recognized a privilege of confidentiality rooted in the separation of powers shielding a President's discussions from unwarranted disclosure, even though no such "privilege" was explicit in Article II of the Constitution.

same is true of virtually all constitutional torts typically alleged against judges and prosecutors.[8]

The neat parallel that Fitzgerald would draw between the governor at issue in *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974), and the President (Resp. Br., p. 24) does not withstand analysis. The President's duties and responsibilities are certainly on an entirely different plane in practice and, more importantly, in terms of their place in the Constitutional framework. The President is subject to a constitutional system of checks and balances not applicable to governors, and is more visible and thus accountable.[9]

In conclusion, the Court's decisions should not be understood as approving a mechanical form of analysis extending absolute immunity to "judicial" but not "executive" officials. The touchstone of absolute immunity is the public's interest in the "vigorous and fearless performance" of an official's duties, balanced against the minimal sacrifice of certain individuals' interest in civil damage actions. In this setting, the President's claim to immunity is of paramount significance.

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[8] In *Imbler* v. *Pachtman*, 424 U.S. 409 (1976), a defendant was sentenced to death on the basis of testimony that the prosecutor allegedly knew was perjured and exhausted the appellate process before the facts suggesting a possibility of prosecutorial misconduct were voluntarily disclosed by the prosecutor himself.

[9] Another basis exists for distinguishing *Scheuer* v. *Rhodes*, *supra*, from this case. In *Scheuer*, this Court had before it the issue of whether Congress intended to make governors absolutely immune from the express cause of action in damages it had created in Section 1983. 416 U.S. at 243, 248. Understandably, the Court was reluctant to conclude that Congress had expressly created damages liability on the one hand while revoking it *sub silentio* on the other. Even in the face of an expression of public policy by Congress that "any person" acting under color of law would be subject to suit, this Court felt compelled to afford a qualified immunity to the governor so as not to destroy his ability to function effectively. By contrast, this case neither turns on a specific expression that Congress intended the President to be liable in damages, nor a general statute holding government officials responsible for breaches of a citizen's private rights.

III

Public Policy Demonstrably Supports Absolute Immunity For The President

Fitzgerald's discussion of the policy considerations bearing on Presidential immunity begins with an attempt to limit artificially the scope of the inquiry. There is no merit to his suggestion that the fortuity of this suit's having been filed *after* Mr. Nixon left office "reduce[s]" Mr. Nixon to arguing anything less than the full range of issues raised by suits against Presidents generally, and this case surely does not depend on whether Mr. Nixon can present "evidence" regarding this suit's effect on the Ford, Carter, and Reagan Presidencies. *See* Resp. Br. 26.

The broader thrust of this argument, echoed throughout the brief, is that some principled basis exists for distinguishing between suits filed against incumbent and former Presidents, and that the compelling policies underlying absolute Presidential immunity are satisfactorily vindicated by postponement of active litigation until after a President has left office. However, the prospect of having to meet suits after leaving office will distract and influence the conduct of Presidents in office in the very same manner as suits pending while they are in office, and Presidents sued for damages to be satisfied from their personal estates cannot be expected to defer work on their defense. [10]

Another theme in Fitzgerald's brief is that Mr. Nixon's understanding of the effects of liability in damages is unsubstantiated — *i.e.*, unsupported by "a whit of evidence," "conjectural," and "exaggerated." Resp. Br. 26-29. To a large extent, of course, the same could be said of this Court's prior immunity decisions. Decisions to

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[10] Indeed, Fitzgerald contemplates that a President would view the period of a stay of a suit as "an opportunity to prepare a defense in the interim" (Resp. Br., p. 28) — an observation directly at odds with his suggestion that suits stayed while Presidents are in office will not divert them from their duties. The perception, noted by Fitzgerald, that defendants benefit from delay reflects the fact that defendants retain the use of the money at stake in a suit pending a final determination. A defendant's chances of ultimately prevailing do not improve with the passage of time and the burden of litigation does not diminish. *Compare* Resp. Br., p. 28.

grant judges, prosecutors, and legislators absolute immunity were not based on social scientific data, but rather on the Court's experience and understanding of the customary response to the threat of litigation. Lack of available evidence, largely a consequence of the absence of suits against Presidents, is surely no reason for this Court to sanction now an experiment regarding the effect of litigation on future Chief Executives.

A growing body of evidence, moreover, suggests that new causes of action and constricted immunity defenses have had a serious impact on lower executive officials. In recent Congressional testimony, the Deputy Attorney General reported that there were in excess of 2,000 *Bivens*-type lawsuits now pending against federal employees, some with multiple defendants, and that the number is growing rapidly as new theories of constitutional tort liability are recognized. Statement of Edward C. Schmults Before the Senate Committee on the Judiciary, Subcommittee on Agency Administration, concerning S. 1775, at 3-4 (Nov. 13, 1981). He and others have stated their experience as being that only the smallest percentage of these suits are meritorious, that their burden is nonetheless substantial, that many are filed to further inappropriate objectives, and that the overall effect on government is negative. *Id.* at 5-6, 9; Statement of Joseph A. Morris, General Counsel, U.S. Office of Personnel Management Before the House Committee on the Judiciary, Subcommittee on Administrative Law and Governmental Relations, on H.R. 24 [hereinafter H.R. 24 Hearings] (November 5, 1981); Statement by Honorable Peter J. Wallison, General Counsel of the Treasury Department, H.R. 24 Hearings (November 5, 1981); Griffin Bell, *Proposed Amendments to the Federal Tort Claims Act*, 16 Harv. J. Leg. 1 (1979). This evidence calls into serious question Fitzgerald's assertion, unsupported by "a whit of evidence," that the response to *Scheuer* and *Butz* has been a responsible one. *See* Resp. Br., p. 27.

Moreover, many of Fitzgerald's specific assurances regarding suits for damages are demonstrably inaccurate. Fitzgerald's suggestion that potential plaintiffs "are far more likely to seek equitable relief than damages" (Resp. Br., p. 27) implies that these forms of relief are mutually exclusive. They are not, and "politically moti-

vated litigants" will certainly join a claim for equitable relief with a blow aimed at a President's personal interests. *E.g.*, *Clark* v. *United States*, 481 F.Supp. 1086, 1090 (S.D.N.Y. 1979), *app. pndg.*, 624 F.2d 3 (2d Cir.); *Bohmer* v. *Nixon*, Civ. No. 75-4-T (S.D. Cal. 1976) (JA 303a); *Fonda* v. *Nixon*, Civ. No. 73-2442-MML (C.D. Cal. May 23, 1974) (JA 308a).

There is particular irony in Fitzgerald's suggestion that all a President need do to satisfy the qualified immunity defense is to seek the advice of counsel. *See* Resp. Br., pp. 27-28. In *Halperin* v. *Kissinger*, 606 F.2d 1192 (D.C. Cir. 1979), Mr. Nixon did precisely that, relying on the advice of his Attorney General and the Director of the F.B.I. Likewise, the record in this case includes a transcript of Mr. Nixon's receiving legal advice from John Ehrlichman (JA 220a-21a), based on legal research done by White House counsel (JA 191a-93a). In both cases, reliance on such advice was of no value from the standpoint of qualified immunity. Plaintiffs merely alleged that the attorney was a "co-conspirator" and in effect that the legal advice was not *bona fide*. *See* R. 244.[11] Such allegations invariably defeat attempts to dismiss suits at the threshold.

More fundamentally, the spectre of Presidents charting this nation's course based on an attorney's advice as to what resolution of a controversial issue will be most defensible in the event of a subsequent civil action is precisely what absolute Presidential immunity is designed to avoid. The "vigorous and fearless performance" of Presidential duties undoubtedly will involve some actions that a lawyer

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[11] The problem is not limited to "Watergate" attorneys. In a recent decision, the D.C. Circuit reversed an order granting summary judgment in favor of Attorneys General Levi, Bell, and Civiletti in a damage action filed against twenty-eight officials, most of whom occupied Cabinet-level or near Cabinet-level positions. *Black Panther Party* v. *Smith*, No. 80-1302 (D.C. Cir. July 8, 1981). In an opinion which also belies Fitzgerald's assertion that qualified immunity is not "as empty a defense as Mr. Nixon suggests" (Resp. Br., p. 27), the court of appeals reinstated these defendants even though the district judge had ruled that the plaintiffs had had "ample opportunity" to take discovery and the court of appeals was "not convinced, on the basis of the record as it now stands, that [the plaintiffs] will be able to uncover any evidence implicating" these defendants. Slip op. at 10, 73.

would have to advise could pose a risk of civil exposure, if for no other reason than the possibility that a legal development might be characterized in retrospect as having been settled law, a new cause of action might be recognized, or counsel may be unable to reconstruct the context for an action on a motion for summary judgment or a trial. Absolute immunity is appropriate precisely in order to assure that this nation is governed ultimately by its elected President, subject to the safeguards embodied in the Constitution, and not by reference to a lawyer's advice addressed to the narrow concerns of future civil liability. [12]

Fitzgerald belittles Mr. Nixon's emphasis on the need for a defense that can be applied at the outset of litigation as a request for "a talisman that may be invoked to ward off all trials." Resp. Br., p. 29. This rhetoric only reflects Fitzgerald's low regard for the policies on which absolute immunity for prosecutors, judges and legislators rests. In those contexts, immunity's value in "warding off trials" is perceived as its strong point (*Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950)):

> The justification for [recognizing absolute immunity] is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.

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[12] Fitzgerald's attempt to downplay the efficacy of political checks on the President rings hollow in light of the facts of his own case. Mr. Fitzgerald has been the subject of widespread press attention for 12 years, and his termination led to Congressional hearings, Presidential consideration of a new position for him, and various Civil Service proceedings in which he has obtained relief. In fact, former President Carter made the Fitzgerald case an issue in his campaign in 1976. Fitzgerald's suggestion that a President will not be deterred by political checks short of impeachment or certain defeat in an upcoming election is plainly incorrect. Finally, while we concede that an individual "in Fitzgerald's shoes" (Resp. Br., p. 31) would prefer "$3,500,000 or more" in money damages to the reinstatement with backpay that he has recovered, the question whether relief other than money damages is "adequate" has never been considered so simplistic.

IV

Private Damage Actions Against A President Are Not Necessary To Protect Congress' And The Courts' Position In The Constitutional Plan

Fitzgerald does not seriously dispute that private damage actions against Presidents who could invoke no more than qualified immunity would entail routine judicial oversight of the motives behind Presidential decisions and inquiry into Presidential communications.[13] Rather, he incorrectly seeks to portray private lawsuits for damages as fundamental to Congress' ability to gather information and the courts' function of protecting rights. These arguments embody serious misunderstandings concerning the basis for absolute immunity and the distribution of powers among the Congress, the Judiciary and the Executive.

Absolute Presidential immunity from a private action for damages is not, contrary to Fitzgerald's position, "an unrestrained power of presidential removal" or a license enabling a President to "trample . . . rights at will." Resp. Br., p. 34. Such immunity does not represent any judicial approval of misconduct — *i.e.*, the granting of a "power" — or remove other checks on a President which prevent his acting "unrestrained" or "at will." Instead, immunity reflects the fact that plaintiffs initially appear in court with nothing more than allegations and that the judicial process of litigating those allegations is

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[13] His brief does criticize Mr. Nixon for "exaggerat[ing] the extent to which conversations with presidential advisers need be revealed," but this contention rests on a mistaken view of qualified immunity. *See* Resp. Br., p. 33 & n.42. In determining whether a President "knew" or "should have known" that an action was illegal, a court must not only examine "the state of the law" but also the facts that the President had before him in acting. *See* R. 447, pp. 4-8; R. 471, pp. 28-33 (disputing the extent of Mr. Nixon's knowledge based on his communications). Moreover, since plaintiffs are always reluctant to accept a defendant's testimony that his actions were in "good faith," a second element of the qualified immunity defense, they routinely seek discovery of communications justifying an inference to the contrary. Finally, Presidential communications will usually be relevant to the plaintiff's case-in-chief.

necessarily imperfect and costly. This reasoning is surely not the same as a decision that courts will cease to "fully perform their function of vindicating individual rights," and grants of absolute immunity to other officials have never been viewed as abrogating any judicial function. *See* Resp. Br. 34.

It unfairly devalues the powers conferred on Congress to suggest that "Congress cannot function effectively" (Resp. Br. 34) unless it can rely on suits by private citizens. In fact, Congress has performed its information-gathering function for 200 years without the benefit of private suits against Presidents, which are instigated by private litigants and thus are a most imprecise means of furthering Congress' role. Far more efficacious tools are available to Congress. It may subpoena witnesses and compel them to testify, a power it exercises with absolute immunity, sometimes not without substantial cost to witnesses. *See Tenney* v. *Brandhove*, 341 U.S. 367 (1951). It may legislate whatever protections it wishes for witnesses (including those proposed by Mr. Nixon which Congress chose not to pass, Resp. Br. 33 n.40), or, as some of its members elected to do in this case, lobby for criminal prosecutions, hold up legislative action requested by executive officials, and conduct hearings investigating and publicizing allegations of misconduct.

V

Fitzgerald's Claims Fall Within The Traditional Scope Of Absolute Presidential Immunity

Conceding the President's authority to prescribe the Secretary of the Air Force's conduct of the affairs of the Air Force, including personnel matters (*see* 10 U.S.C. § 8012(b)), Fitzgerald nonetheless asserts that actions taken by Mr. Nixon with regard to Fitzgerald were beyond the scope of any available immunity. He relies on his allegations that the reorganization through which Fitzgerald's job was abolished was a "sham" and that Mr. Nixon lacked lawful authority to terminate Fitzgerald "summarily" (Resp. Br., pp. 37-40). Neither allegation is material to the scope of Presidential immunity, since both concern only whether the actions attributed by Fitzgerald to Mr.

Nixon were "lawful" or "authorized," an issue distinct from whether they had "more or less connection with the *general matters committed by law to [Mr. Nixon's] control or supervision.*" *Spalding* v. *Vilas*, 161 U.S. 483, 498 (1896) (emphasis added).

A plaintiff does not raise a material dispute on the scope of an immunity merely by arguing that an action concededly within the "general matters" committed to a President's supervision — here, the personnel of the Department of Defense and the organization of their jobs — was a "sham." Any such rule would effectively vitiate both absolute and qualified immunity, since no plaintiff would hesitate to allege that official action was no more than a cover for a private wrong, and full litigation into the official's motives, essentially the merits of the suit, would be necessary to resolve the issue. This Court's decisions do not permit a plaintiff to circumvent a judge's absolute immunity by arguing that an order by a judge, not "in clear absence of jurisdiction," was a "sham" whose purpose was to inflict an unlawful injury. *Stump* v. *Sparkman*, 435 U.S. 349, 356-57 (1978). Fitzgerald's contention should be treated no differently. [14]

Similarly, the allegation that Mr. Nixon directed Seamans to discharge Fitzgerald "summarily" — *i.e.*, without the "cause" prescribed by 5 U.S.C. § 7512(a) — is relevant solely to the issue of whether the termination is lawful or "authorized," a much narrower issue than whether Defense Department employment was among the "general matters" within the President's cognizance. An action does not fall beyond the scope of any immunity whatever because it does not comply with all statutory qualifications placed on that action. Compliance with such statutory criteria, like the ones referred to by Fitzgerald, is relevant to whether an official has acted lawfully with

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[14] The CSC hearing examiner did not conclude that reorganization was "a sham," but rather that Fitzgerald was included in a *bona fide* reorganization for improper reasons — a finding that confirms that Fitzgerald's version of the scope of the immunity test would turn directly on the motives of officials responsible for official action. (*Compare* Resp. Br., pp. 39 n.45, 40). The district court's statement that "the President had no authority to hire, discharge, or interfere with the employment of an employee such as Fitzgerald" (JA 57a) is clearly incorrect in light of 10 U.S.C. § 8012(b) and the authority of the Secretary of the Air Force.

regard to "general matters" committed to his control or supervision, but not to whether he was acting beyond the scope of those matters altogether. Fitzgerald's analysis, which is merely an alternative means of verbally packaging the ultimate merits of the dispute, would, if generally applied, render immunities meaningless by making them unavailable except where an official's action was "authorized" and thus lawful.

In conclusion, it is appropriate to emphasize the basis for the absolute immunity summarized in *Spalding* v. *Vilas*, 161 U.S. 483, 494-95 (1896):

> The public are deeply interested in this rule, which, indeed, exists for their benefit, and was established in order to secure the independence of the judges and prevent their being harassed by vexatious actions.

If the public's interest justifies absolute immunity for all judges, prosecutors and members of Congress and their aides, within the limits set by decisions of this Court, surely the same interest and the same reasoning apply to the President.

CONCLUSION

For the reasons stated above and in the Brief for Petitioner Richard Nixon, the judgment of the court of appeals should be vacated and the case remanded with instructions to dismiss with prejudice the plaintiff's Second Amended Complaint against Petitioner Nixon.

Respectfully submitted,

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